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IN THE

Supreme Court of the United States

ROCHELLE BROSSEAU, A CITY OF PUYALLUP, WASHINGTON, POLICE OFFICER,
Petitioner,

v.

KENNETH J. HAUGEN,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that there is a triable issue of fact as to whether petitioner Rochelle Brosseau's use of deadly force in shooting respondent Kenneth Haugen in the back as he started his jeep to flee the scene was objectively unreasonable and therefore violated the Fourth Amendment, when, viewing the evidence in the light most favorable to him, Haugen was not suspected of committing a violent crime, did not act in an aggressive manner toward Brosseau or anyone else, did not wield a weapon, had only just started his jeep's engine at the moment he was shot, and had a clear path of escape with no officers in his way.

2. Whether the court of appeals also correctly ruled that Haugen's Fourth Amendment right to be free from the unreasonable exercise of deadly force under these circumstances was clearly established at the time of the shooting, under the standards governing the use of force announced in *Tennessee v. Garner*, 471 U.S. 1 (1985), and *Graham v. Connor*, 490 U.S. 386 (1989), and other case law establishing that a law enforcement officer is not entitled to shoot a suspect merely because he is seeking to evade arrest by fleeing in a vehicle, unless the officer has a reasonable, objective basis for believing that the suspect poses a threat of death or serious physical harm to the officer or others.

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RESPONDENT'S BRIEF IN OPPOSITION

Petitioner Rochelle Brosseau shot respondent Kenneth Haugen in the back, puncturing his lung, as he tried to flee from police in his Jeep Cherokee. A panel of the Ninth Circuit properly held that Brosseau was not entitled to summary judgment on qualified immunity grounds, concluding that the evidence, taken in the light most favorable to Haugen, did not even "present a borderline case." 351 F.3d 372, 392 (9th Cir. 2003). Viewed in Haugen's favor, the record contains evidence that Brosseau shot Haugen in the back even though he had committed no crime indicating that he posed a significant threat of serious physical harm to Brosseau or others; that Brosseau had no objectively reasonable basis to believe either that Haugen had a gun or that other officers stood in the path of Haugen's jeep; that Haugen did not display any aggressive behavior toward Brosseau or anyone else as he endeavored to flee the scene; and that Haugen had only just started his vehicle's engine at the moment he was shot and had a clear path of escape down a driveway.

Brosseau and her amici States and peace officers claim that the court of appeals' fact-bound ruling creates a split among circuits that have addressed the lawfulness of an officer's use of deadly force to halt a felon escaping arrest in a vehicle, that the court's decision fails to apply the qualified immunity analysis required by this Court's precedents, and that the decision portends a new era in which § 1983 actions charging law enforcement officers with the unreasonable use of deadly force will routinely be sent to trial in the Ninth Circuit.

There is no merit to any of these arguments. In contrast to such cases as *Siegert v. Gilley*, 500 U.S. 226 (1991), and *Saucier v. Katz*, 533 U.S. 194 (2001), in which this Court granted certiorari "in order to clarify the analytical structure under which a claim of qualified immunity should be addressed," *Siegert*, 500 U.S. at 231, this case presents no such analytical or other important legal question to resolve. It is undisputed that the court of appeals enunciated the correct two-

part legal standard established in *Saucier v. Katz*, 533 U.S. 194 (2001), for determining whether a law enforcement officer is entitled to summary judgment on qualified immunity grounds: first, whether, "'[t]aken in the light most favorable to the party asserting the injury, . . . the facts alleged show the officer's conduct violated a constitutional right'"; and, if yes, second, "'whether the right was clearly established such that it would be clear to a reasonable officer that [her] conduct was unlawful in the situation [she] confronted.'" 351 F.3d at 380-81 (quoting *Saucier*, 533 U.S. at 201-02). The only question presented by the petition is the correctness of the court of appeals' application of that settled legal standard to a particular set of facts, based on the record before it, and such a question is rarely, if ever, a reason to grant review. *See* S. Ct. R. 10.

Nor does the court of appeals' ruling create a split in the circuits. Although petitioner and her amici attempt to portray the Ninth Circuit's decision as "completely at odds with every other circuit court that has considered the Fourth Amendment issue," Cert. Pet. 2, that claim is unfounded. As the court of appeals correctly recognized, the cases on which Brosseau relies involve strikingly different facts—high-speed car chases in which suspects deliberately attempted to ram police vehicles and endangered other drivers or pedestrians on the road. As discussed below, in more analogous cases, the circuits have ruled that an officer violates the Fourth Amendment if he shoots a suspect about to flee in an automobile without some reasonable basis to believe that the suspect actually poses a threat of serious physical harm to the officer or others.

Finally, Brosseau's policy argument—that officers will be denied qualified immunity at early stages of the litigation and will be forced to go to trial in every deadly force case in the Ninth Circuit—has already proved to be unfounded. In the 11 months since the panel's decision was handed down, the court of appeals has already held that law enforcement officials accused of unlawful use of deadly force were entitled to

summary judgment, including in cases involving vehicular flight. More importantly, Brosseau's policy argument carries little weight in this case. If *Haugen* is not entitled to a jury trial to gauge the reasonableness of Brosseau's decision to shoot him, then it is difficult to envision *any* victim of the use of deadly force who would be entitled to press a claim. The Ninth Circuit's decision turns on its own facts, and there is no basis for further review.

STATEMENT

Brosseau contends that "[t]he factual specifics are not disputed," Cert. Pet. 3, but then proceeds to describe several key facts as reported by Brosseau, even though they are disputed by Haugen and other witnesses at the scene. Similarly, Brosseau's and amici's factual recitations rely on events and information, designed to elicit sympathy for Brosseau's conduct, that unfolded or came to light only *after* the shooting—such as the fact that Haugen had "a lengthy criminal history," *id.* at 5, and a history of methamphetamine use. Amicus Br. of Police Officers Research Association of California Legal Defense Fund et al. ("Peace Officers Amicus Br.") 3-4. Viewed in the light most favorable to Haugen, the party resisting summary judgment, *see Saucier*, 533 U.S. at 201, and evaluated at the time Brosseau actually fired her gun, the key facts are as follows.

On February 20, 1999, the day before the shooting, Greg Tamburello visited the City of Puyallup, Washington police station to report an alleged burglary of his business in a neighboring town by former associate Kenneth Haugen. Tamburello spoke to Brosseau and accused Haugen of stealing $1500 worth of equipment. Brosseau directed Tamburello to file a report with the neighboring county sheriff's department. She checked computerized records and learned that Haugen had an outstanding "felony no bail warrant" for UPCS (unlawful possession of a controlled substance). "Garrity"

Statement of Officer Brosseau ("Brosseau Statement") 13. She knew nothing else about his criminal or drug-use history. Interview of Officer Brosseau ("Brosseau Interview") 20.[1]

The next day, on February 21, Brosseau was dispatched to a fight in progress in the driveway of Haugen's mother's house. The dispatch report was that two unarmed men were fighting on the ground. Brosseau Statement 13. When Brosseau arrived at the scene, she observed Tamburello, Haugen, and a third man, Matt Atwood, who was assisting Tamburello, heading toward Tamburello's black pickup truck, which was parked at the foot of the driveway. *Id.* at 14. According to Haugen and other observers, Tamburello and Atwood were forcibly dragging Haugen into the truck. Deposition of Kenneth Haugen, Vol. 1 ("Haugen Depo."), 116, 120; Interview of Kenneth Haugen ("Haugen Interview") 39; Interview of Matthew Atwood ("Atwood Interview") 53-54; Interview of Irene Riddle ("Irene Riddle Interview") 64. Deanna Nocera, Haugen's girlfriend, who was on the scene and had witnessed the altercation, reported to Brosseau at some point before the shooting that Tamburello had assaulted Haugen in the driveway. Brosseau Statement 15; *see* Interview of Deanna Nocera ("Nocera Interview").

Brosseau approached the truck, and Haugen took advantage of the momentary distraction to jump out of the truck and run up the driveway and behind the houses. Brosseau Statement 14; Haugen Depo. 120-23; Haugen Interview 41; Atwood Interview 55; Irene Riddle Interview 64; Nocera Interview. Tamburello told Brosseau that the man who had run by was Haugen. Brosseau Statement 14. Brosseau

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[1] Materials from the summary judgment record are identified herein by the titles appearing on the documents. The documents will be cited by their bate-stamped page numbers, where page numbers are provided. The Deposition of Kenneth Haugen, Vol. 1, will be cited according to transcript page.

noticed that a Jeep Cherokee was sitting in the driveway, in the process of being spray painted bright yellow. *Id.* The jeep was facing the street, angled diagonally toward the left. Nocera Interview; Haugen Depo. 115 & Exh. 3 (diagram). Also on the driveway, in front of and facing the jeep, was Deanna Nocera's small red car. Brosseau Statement 14, 15; *see also* Haugen Depo., Exh. 3 (diagram); Photographs Taken by Police Investigators ("Police Photographs") 34-37. The driveway was 20 feet wide. Haugen Depo. 137. The jeep was parked about four feet away from Nocera's car and 20-30 feet away from Tamburello's pickup truck at the foot of the driveway. Haugen Depo. 115, 137; Atwood Interview 58. The alignment of the vehicles left a clear exit path for the jeep down the left side of the driveway. Haugen Depo. 160 & Exh. 3; Haugen Interview 44; Police Photographs 34-37.

Brosseau did not immediately give chase, but requested a K-9 unit and told the Riddles, who lived next door, to stay in their house; Tamburello and Atwood to remain in Tamburello's pickup truck; and Nocera and her three-year-old daughter to remain in the red car. Brosseau Statement 14; Atwood Interview 55. Two officers arrived on the scene with a K-9 to help track down Haugen, and a search ensued over the next half hour or 45 minutes. Brosseau Statement 14-15; Atwood Interview 56; Puyallup Police Department Case No. 99-01392 ("Police Report"), at 5. Eventually, Officer Subido radioed from down the street that a neighbor on the side of Haugen's mother's house away from the driveway had seen a man in her backyard. Brosseau Statement 15. Brosseau ran in that direction. Haugen then ran out from between the houses, ahead of her. He ran past the front of his mother's house and then turned and ran up the driveway. As Brosseau followed, Haugen entered the jeep from the driver's side and closed the door. *Id.* Brosseau said she at first believed Haugen was going to the jeep for a weapon because she "could see no other purpose for his trying to hide in that vehicle." *Id.*

Brosseau ran to the driver's side door, with her handgun drawn, but the door was locked. She pointed her gun at Haugen and ordered him to stop. *Id.* at 15-16. Haugen began fumbling for his car keys. Haugen Depo. at 143, 145, 147; Haugen Interview 42-43. Brosseau hit the driver's side window several times with her handgun, and on the third or fourth try, the window broke. Brosseau Statement 16; Brosseau Interview 21-22; Haugen Interview 43; Haugen Depo. 147-49; Atwood Interview 58; Interview of Greg Tamburello ("Tamburello Interview"). Although Brosseau was yelling orders at Haugen to get out of the car, Haugen remained silent, focused on retrieving his car keys.[2] Brosseau claimed that she saw Haugen reach down toward the front seat's floorboard and that she feared he might be reaching for a weapon, but when she broke the window, she saw that Haugen had only keys in his hand and was putting one into the ignition. Brosseau Statement 16. Brosseau had pepper spray and a baton, but did not use them. Brosseau Interview 31. Instead, she struck Haugen on the side of his head with the barrel and butt of her gun. Brosseau Statement 16; Brosseau Interview 23; Haugen Interview 43. Haugen did not raise his arm to deflect another blow, but "seemed strangely focussed on his actions." Brosseau Statement 16.

Brosseau struck Haugen again and reached in to try to grab

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[2] Brosseau claimed in her Statement (at 16) that Haugen yelled "Go ahead and shoot me! You're gonna have to fuckin kill me!" In her later interview, however, Brosseau did not repeat this account of Haugen's words, but described Haugen's response to her commands as "looking straight forward and focusing on putting the keys into the ignition." Brosseau Interview 22. Haugen denied saying anything, Haugen Depo. 146, 148; Haugen Interview 46, and other witnesses nearby who overheard Brosseau did not hear Haugen say a word, but saw him concentrating on looking for his keys and starting up the jeep. Atwood Interview 57; Interview of Aaron Riddle ("Aaron Riddle Interview") 72.

the car keys out of the ignition, but at that instant, Haugen succeeded in starting the jeep. *Id.*; Brosseau Interview 24-25. Brosseau later contended that at the moment the engine started, she saw Haugen dive forward as if to grab something, such as a weapon, from the floorboard. Brosseau Statement 16; Brosseau Interview 24-25. However, according to Haugen's account of his actions in the jeep, Haugen Depo. 146-49; Haugen Interview 43, which is consistent with descriptions given by other witnesses, *e.g.*, Atwood Interview 57, 59; Nocera Interview, Haugen never made any such movement, but simply fumbled with his keys and eventually started up the jeep.

At the moment that the jeep's engine started, Brosseau jumped left and fired one shot through the rear driver's side window at a forward angle at Haugen (and thus toward the street), hitting him in the back. Brosseau Statement 16.[3] She admitted that at the time she shot him, she did not believe that there was an immediate threat to her life and was not worried that Haugen would use a weapon against her. Brosseau Interview 29. And, indeed, Brosseau never saw a weapon. Brosseau said she shot Haugen because of "his driving, more than anything else." *Id.* Although Brosseau said she did not believe "he could see where he was going" because of the newspaper supposedly covering the front windshield, *id.*; Brosseau Statement 14, the windshield was *not* covered. Atwood Interview 54; Haugen Depo. 144-45; Tamburello Interview. Indeed, Atwood was watching Haugen through the

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[3] Initially, before the forensics report was complete, Haugen speculated that Brosseau had accidentally fired her gun when she was striking Haugen through the broken driver's side window. Haugen Depo. 150-53. The forensics report confirmed Brosseau's account, however, that she shot Haugen through the driver's side rear window and not at point-blank range. KMS Forensics Laboratory Report 44-45.

windshield as events unfolded. Atwood Interview 57.

Brosseau also maintained that Haugen was "driving in an erratic manner." Brosseau Interview 29. Yet by all witness accounts, Brosseau either shot Haugen at the exact same time the engine started, Haugen Depo. 153; Aaron Riddle Interview 72; Irene Riddle Interview 65, or within an instant of its starting before the jeep had traveled more than a few feet. Atwood Interview 60; Tamburello Interview; Nocera Interview; Interview of Florence Ledbetter. She claimed to be fearful for other officers on foot, for the occupied vehicles in Haugen's path, and for any other citizens who might be in the area. Brosseau Statement 16; Brosseau Interview 25. She admitted, however, that she could not see any other officers in the area. Brosseau Interview 26. From his vantage point in the pickup truck at the foot of the driveway, Atwood confirmed that the other officers were still in the neighbor's backyard and not in front by the street. Atwood Interview 56.

Haugen kept driving. He turned his wheels to the left and steered his jeep, already angled in that direction, toward the left, around his girlfriend's car. Atwood Interview 59-60; Haugen Interview 44. Although it was a "small, tight space," there was still "plenty of room for a car to drive by," Haugen Depo. 160, and he had a "clear, straight shot right through there." Haugen Interview 44. Photographs of the scene bear out Haugen's claim, as they reflect that there was plenty of room for the jeep to drive away without striking Nocera's car or Tamburello's pickup truck. *See* Police Photographs 34-37. As Haugen began to drive, Tamburello backed his truck up several feet to try to prevent Haugen from leaving. Tamburello Interview; Haugen Interview 49. Haugen drove the jeep across the neighbors' lawn, avoided the pickup truck, and reached the street without hitting anything. Haugen Depo. 160, 162; Nocera Interview; Irene Riddle Interview 65.

The police pursued him for less than a mile. Haugen Depo. 166. After about a half block, Haugen realized that he

had been shot. He was unable to shift his jeep out of third gear because he was trying to stop the blood by holding the bullet hole with his right hand, and so his speed did not top 45 miles per hour. *Id.* at 162-64, 166. Haugen was having difficulty breathing; he stopped the jeep and fell out the driver's door onto the pavement. *Id.* 167. The sergeant who pursued Haugen and approached him after he stopped appeared "bewilder[ed]" to discover that Haugen had been shot. *Id.*; *see also* Police Report 5, 10. Haugen suffered a collapsed lung and was airlifted to a hospital. He survived the shooting and subsequently pleaded guilty to attempting to elude a pursuing police vehicle in violation of Wash. Rev. Code § 46.61.024.

REASONS FOR DENYING THE WRIT

I. THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S PRECEDENTS AND CREATES NO SPLIT IN THE CIRCUITS ON THE LEGALITY OF THE USE OF DEADLY FORCE UNDER THE FOURTH AMENDMENT.

A. Consistency with this Court's Precedents

Brosseau contends that the Ninth Circuit's decision is inconsistent with this Court's cases, arguing that the court of appeals not only viewed the facts in the light most favorable to Haugen, but assumed the ultimate legal conclusions in Haugen's favor as well. Cert. Pet. 17. Similarly, the amici States fault the court for adopting a "total scene perspective" based on facts and circumstances beyond Brosseau's knowledge. Amici Br. of Washington et al. ("States Amici Br.") 4-5. These criticisms are unfounded. Although the court of appeals construed the facts in the light most favorable to Haugen, as this Court requires, *Saucier,* 533 U.S. at 200, 201, its opinion painstakingly considered the factors bearing on Brosseau's use of force—Haugen's prior crimes, potential

weapon, and impending escape in a vehicle—from the perspective of "the objective facts and circumstances *known to Brosseau* at the time she acted." *E.g.*, 351 F.3d at 387 (emphasis added).

As this Court has recognized, the Fourth Amendment protects persons "against unreasonable . . . seizures" and thus prohibits the use of excessive force by police in the course of arresting individuals suspected of crimes. *Graham*, 490 U.S. at 394. "The 'reasonableness' of a particular seizure depends not only on *when* it is made, but also on *how* it is carried out." *Id.* at 395. In *Tennessee v. Garner*, 471 U.S. 1 (1985), this Court announced the constitutional rule governing when police officers may use deadly force. The Court held that "[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." *Id.* at 11. Deadly force is permissible in limited circumstances, however:

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

Id. at 11-12; *see also Graham*, 490 U.S. at 396 (the reasonableness of the use of force turns on "the severity of the crime at issue, whether the suspect poses an immediate threat

to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight").

Here, the Ninth Circuit carefully analyzed from Brosseau's perspective whether the decision to shoot was objectively reasonable—in other words, whether it was reasonable for Brosseau to believe that Haugen "pose[d] a significant threat of death or serious physical injury to the officer or others." 351 F.3d at 381 (quoting *Garner*, 471 U.S. at 3). As the court of appeals found, on Haugen's version of the facts it was objectively unreasonable for her to shoot.

First, at the time of the shooting, Brosseau did not have probable cause to believe that Haugen had committed a crime involving "the infliction or threatened infliction of serious physical harm." *Garner*, 471 U.S. at 11. Haugen was accused by Tamburello, his former business partner, of burglary, the nonviolent property crime also at issue in *Garner*. As this Court acknowledged in *Garner*, "[w]hile we agree that burglary is a serious crime, we cannot agree that it is so dangerous as automatically to justify the use of deadly force." *Id.* at 21. Brosseau also knew that Haugen had an outstanding warrant for drug possession. There was nothing in Haugen's criminal history of which Brosseau was aware at the time of the shooting that would suggest that Haugen had *ever* committed a violent crime. *See* 351 U.S. at 382-83. Moreover, Haugen was unarmed and did not react aggressively toward Brosseau even when she hit him in the head with her handgun. He did not menace Brosseau or anyone else with his jeep—such as by swerving at or attempting to ram vehicles in the area. Nor did Haugen shout out any crazed invitations to Brosseau to shoot him in order to stop him. He remained silent, intent on starting up the jeep.

Second, Brosseau said she believed at several different points that Haugen might have a weapon in his jeep. But by the time she approached the jeep and observed Haugen trying to start it and struck him with her gun, she could see that he had

not retrieved a weapon. Just as Haugen started the car, Brosseau said again that Haugen dived forward as if to grab something, such as a weapon, on the floorboard. Brosseau admitted, however, that at the time she shot Haugen, she was not worried that he would use any weapon against her, and in fact, Haugen retrieved none. More importantly, however, the factual basis of Brosseau's stated fear of a weapon is that Haugen dove forward as he started the car. Her claim that Haugen made this gesture, however, is disputed. Taking the facts in the light most favorable to Haugen, he did not dive forward, but instead sat in his jeep fumbling with his keys until he was able to get the jeep started. *See id.* at 383.

Third, Brosseau claimed that she shot Haugen because he "was driving in an erratic manner," and she feared Haugen would injure officers or others when he tried to escape in his jeep. Yet, as the court of appeals correctly recognized, the officer's statement that Haugen was driving erratically was not supported by the evidence regarding the timing of the shooting. Haugen and the other bystanders agree that Brosseau shot him at either the moment the jeep moved or within an instant after the jeep started. Thus, at the time Brosseau fired, taking the evidence in the light most favorable to Haugen, he either was not driving at all or the jeep had barely "started to roll." Nocera Interview. She also claimed that Haugen's driving was especially dangerous because the front windshield was covered with newspaper so that he could not see where he was going. Yet again, the evidence taken in Haugen's favor was that the windshield was *not* covered. 351 F.3d at 385-86. Brosseau now argues that Haugen's alleged reckless driving after he was shot, culminating in his guilty plea to attempting to elude a police vehicle, also validates her decision to shoot. Cert. Pet. 3, 15, 19. Yet the manner in which Haugen drove *after* he was shot is irrelevant to the reasonableness of Brosseau's decision

to fire.[4] If Haugen's subsequent conduct can be used to test the reasonableness of Brosseau's decision to shoot, then surely the fact that he drove easily around the supposed obstacles in his path and escaped to the street without hitting anything or anyone is even more significant, especially given that Brosseau's main reason for shooting Haugen was the danger he purportedly posed to the vehicles or people in his path.

Brosseau contended that she was fearful for officers on foot whom she believed were in the area and the occupied vehicles in the jeep's path. Yet, again, taking the facts in the light most favorable to Haugen, *there were no officers on foot* in front of the driveway; the other two officers were still behind the houses. Brosseau admitted she did not see any other officers when she fired. It is not an unfair "total scene perspective," States Amici Br. 4-5, for the court of appeals to find that there was no objective basis to support Brosseau's fear for the safety of her fellow officers. 351 F.2d at 386-87. When she shot Haugen, she was alongside the driver's rear window, firing in a forward direction. There was no reason that she would not have been able to see whether other officers were in the vicinity.

Brosseau likewise had no objective basis to fear for the safety of Nocera in her red car or Tamburello and Atwood in the pickup truck. Brosseau knew that Nocera was Haugen's girlfriend and had no reason to believe he would want to harm her. The wheels of Haugen's jeep were also angled left so that he could easily drive around Nocera's red car. Tamburello and

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[4] Indeed, the court of appeals rejected Brosseau's defense to Haugen's state-law claim—that Haugen was injured while engaged in the commission of a felony—because, construing the facts in Haugen's favor, it appeared that Brosseau shot Haugen *before* he had begun to "drive his vehicle in a manner indicating a wanton or wilful disregard for the lives or property of others." 351 F.3d at 394. There was no dissent on this point.

Atwood, on the other hand, were so obviously not threatened with any serious physical harm by Haugen's jeep that Tamburello actually *backed up* his truck in an effort to block Haugen as he started the jeep. Taken in the light most favorable to Haugen, the court of appeals was right to point out that Haugen had a "clear, straight shot" out of the driveway and that the photographs from the scene further demonstrated that Haugen had more than enough room to drive away without striking either Nocera's car or Tamburello's truck. *Id.* at 386. The court's analysis does not depend on hindsight, Cert. Pet. 4; States Amici Br. 5-7, but on the facts "evaluated as of the time Brosseau actually fired her gun." 351 F.3d at 391. The officer had no objectively reasonable basis to support her belief that Haugen's escape from the driveway posed a significant risk of death or serious injury to the people in the car or the pickup truck. *Id.* at 386.

That Brosseau fired in a forward direction, through the driver's side rear window toward Haugen in the driver's seat—when she claimed to fear that people were in the way of the jeep—underscores the unreasonableness of her conduct. The passengers inside the vehicles and the (nonexistent) officers supposedly in the jeep's path were in far greater danger from Brosseau's bullet than they were from the jeep. *See, e.g., Hernandez v. City of Miami,* 302 F. Supp. 2d 1373, 1380-81 (S.D. Fla. 2004) (denying summary judgment to officer who fired from inside the patrol car through the suspect car's open passenger window, "increasing the risk that someone else might be shot" because of the officer's "limited line of sight from inside the car"). Brosseau's decision to shoot is more credibly viewed as the product of frustration at being unable to stop Haugen from escaping than an action grounded on a legitimate concern for the safety of others in front of the jeep.

In sum, the Ninth Circuit's review of the summary judgment record amply supports its conclusion that a reasonable jury could find that Brosseau violated the Fourth

Amendment when she shot an unarmed, nonaggressive man in the back. 351 F.3d 391. Consideration of such a fact-specific question by this Court is wholly unwarranted.

B. Circuit Cases

In an effort to portray this case as involving something more than the application of law to a particular set of facts, Brosseau argues that the court of appeals' decision creates a split in the circuits regarding the lawfulness of the use of deadly force under the Fourth Amendment to stop a suspect who is about to escape by vehicle. Cert. Pet. 13-17. This claim is demonstrably unfounded. As this Court has pointed out, that courts reach different answers as to whether particular applications of force are excessive follows from "the nature of a test which must accommodate limitless factual circumstances." *Saucier,* 533 U.S. at 205.

Brosseau and her amici cite several circuit decisions holding that the danger presented by suspects engaged in high-speed pursuits can justify the use of deadly force. *See* Cert. Pet. 15-16 (citing *Scott v. Clay County,* 205 F.3d 867 (6th Cir. 2000); *Smith v. Freland,* 954 F.2d 343, 347-48 (6th Cir. 1992); *Cole v. Bone,* 993 F.2d 1328 (8th Cir. 1993); *Pace v. Capobianco,* 283 F.3d 1275 (11th Cir. 2002)). Each of these decisions, as the Ninth Circuit recognized, is strikingly distinguishable. *See* 351 F.2d at 389.

In *Smith,* the Sixth Circuit held that an officer was justified in using deadly force after the suspect led police "on a wild chase at speeds in excess of ninety miles per hour," swerved toward a police cruiser, smashed into the officer's car, and continued to drive on. 954 F.2d at 344, 347. The Sixth Circuit upheld a similar use of deadly force in *Scott.* There, officers used deadly force after the suspect had swerved off the road, narrowly missing a police cruiser, led police on a chase for over twenty minutes at speeds ranging between 85 to 100 miles per hour, and, then, when the suspect lost control, attempted to

run down a police officer. 205 F.3d at 872, 877-78. In *Cole*, the Eighth Circuit upheld the use of deadly force where the suspects, driving an eighteen-wheel tractor-trailer, led police on a 50-mile car chase at speeds over 90 miles per hour, forcing more than one hundred cars off the road and attempting to ram several police cars. 993 F.2d at 1330-31, 1333-34. Finally, in *Pace*, the Eleventh Circuit sustained the use of deadly force after the suspect, already pepper-sprayed by an officer through his car window, led officers on a fifteen-minute high-speed chase during which he made erratic turns, swerved at police cars approaching from the opposite direction, drove through a front yard at high speed, almost hit a motorist head-on, and then accelerated toward a police car trying to block the road. 283 F.3d at 1277-78, 1281-82.

None of the factual scenarios that arose in these high-speed pursuit cases remotely resembles the situation that confronted Brosseau when she shot Haugen. Brosseau shot Haugen at the moment he started his engine. There was no high-speed pursuit and no attempt by Haugen to swerve or ram his car at anyone—or indeed, to take *any* threatening action at all. As the Ninth Circuit also correctly points out, Brosseau never stated that she shot Haugen to prevent a high-speed chase, and so the record below was not developed regarding when it would be appropriate for officers in Puyallup County, Washington to initiate or continue a high-speed chase. 351 F.2d at 387.

Brosseau neglects to point out that the Ninth Circuit's ruling is consistent with several circuit rulings, arising in much more analogous circumstances, that an officer violates the Fourth Amendment when he shoots a suspect in a vehicle without a reasonable, objective basis for believing that the suspect actually poses a threat of serious physical harm. In particular, when the evidence, taken in the light most favorable to the plaintiff, shows that, as here, the suspect did not menace officers or others with his vehicle or that officers were not

positioned so as to be in imminent jeopardy from the vehicle, the courts of appeals have held that the plaintiff's Fourth Amendment claim survived summary judgment. In *Estate of Starks v. Enyart*, 5 F.3d 230, 233 (7th Cir. 1993), for example, the Seventh Circuit denied summary judgment to officers who shot a suspect, suspected of stealing a cab, who was driving the cab toward one of them as he attempted to flee. The court reasoned that the suspect's "escape attempt did not involve menacing a police officer or civilian with a weapon—at least not until [the officer] stepped into the path of a car that had just begun to accelerate quickly." *Id.* at 233. On plaintiff's version of the facts, his attempt to maneuver the cab was not so reckless that "police officers could reasonably fear for their safety or the safety of the community." *Id.* Indeed, the court questioned how fast the cab could be moving, "even with a floored accelerator, from a full stop after less than ten feet," *id.* at 234 n.1—an obvious question here as well, where the red car and pickup truck supposedly endangered by Haugen were only feet away.[5]

Similarly, in *Cowan v. Breen*, 352 F.3d 756, 763 (2d Cir. 2003), the Second Circuit denied summary judgment to an officer who shot and killed the driver of a car the officer feared was driving at him because, on plaintiff's version of events, the officer was not in front of the vehicle, the officer did not wave his hands at the driver, and the vehicle made no sudden turns.

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[5] The Ninth Circuit 1994 decision in *Bray v. County of San Diego*, 1994 WL 65305 (9th Cir. Mar. 2, 1994), was similar. There an officer shot and killed a suspect driving a possibly stolen pickup truck when he began backing up and the deputies were approximately ten feet behind the truck. *Id.* at *1. The court held that the officer's use of deadly force was objectively unreasonable, even assuming that the truck was rapidly backing up, because it was unreasonable for the officer to believe "that they would suffer death or serious physical harm from the backing up of Bray's truck." *Id.* at *3.

Moreover, even if faced with an oncoming vehicle, the court concluded that the proper police response would be to get out of the way rather than shoot. *Id.* at 763; *accord Abraham v. Raso*, 183 F.3d 279 (3d Cir. 1999) (denying summary judgment to officer who shot and killed the driver of a car in a mall parking lot, attempting to escape after stealing clothing, where there was a genuine factual dispute regarding how close the officers were, where they were positioned, and whether they were actually in jeopardy from the car backing up).

Even *after* high-speed car chases have occurred—again, not the case here—the courts of appeals have hesitated to find use of deadly force lawful at summary judgment where it was not clear that the suspect had posed a hazard to the officer or others at the time of the shooting. In *Vaughan v. Cox*, 343 F.3d 1323 (11th Cir. 2003), for example, the same circuit that decided *Pace v. Capobianco, supra*, held that a reasonable jury could find that an officer acted unreasonably in firing at a pickup truck even after a pursuit at 80-85 miles per hour in a 70 mile-per-hour zone, because, on plaintiff's version of events, it was not clear when the officer fired that he had probable cause to believe that he or other officers "were in immediate danger from the suspects," and the record did not reflect "that the suspects had menaced or were likely to menace others on the highway at the time of the shooting." *Id.* at 1330.[6]

So, too, in *McCaslin v. Wilkins*, 183 F.3d 775 (8th Cir. 1999), the circuit that decided *Cole v. Bone, supra*, denied summary judgment to a police officer who shot and killed a

[6] *Accord Waterman v. Batton*, 294 F. Supp. 2d 709, 724-31 (D. Md. 2003) (finding Fourth Amendment violation where police shot and killed a driver stopped after a car chase when, taking the evidence in the light most favorable to plaintiff, a reasonable officer would have perceived that none of the officers was directly in front of the driver's vehicle when he accelerated again and that the driver did not steer his vehicle toward the officers).

suspect after a high-speed car chase that occasionally exceeded speeds of 100 miles per hour. The suspect eventually swerved off the road, sliding down into a ditch. Although the officers claimed that the suspect's truck drove back up the hill at them, forcing them to shoot, other witnesses maintained that the shots began almost immediately after the truck left the road. *Id.* at 777. The Eighth Circuit denied summary judgment because there was a genuine dispute as to what the driver was doing when the officers shot and killed him. *Id.* at 779.

Brosseau also argues that the Ninth Circuit's rejection of her concerns that Haugen may have been attempting to retrieve a weapon when he supposedly dived downward is at odds with *Reese v. Anderson*, 926 F.2d 494, 501 (5th Cir. 1991); *see* Cert. Pet. 16; *see also* Peace Officers Amicus Br. 9-10 (citing *Reese* and *Thompson v. Hubbard*, 257 F.3d 896 (8th Cir. 2001)). In *Reese*, robbery suspects led officers on a car chase, the passenger threw what appeared to be pieces of a stolen cash register out the window, and the driver spun his car out of control. Despite orders from an officer for the occupants to raise their hands after the car had come to a stop, the passenger repeatedly raised and lowered his hands below the officer's sight line. The Fifth Circuit held that the officer could reasonably believe that the suspect had retrieved a gun and was about to shoot. *Reese*, 926 F.2d at 500-01. In *Thompson*, an officer responded to a report of shots fired and two suspects fleeing on foot from the scene of an armed robbery. One suspect led the officer on a foot chase and moved his arms as though reaching for a weapon at waist level. When his arms continued to move after the officer yelled "stop," the officer shot and killed him. The Eighth Circuit likewise held that the use of deadly force was reasonable. 257 F.3d at 898-99.

Here, by contrast, there was no violent prelude to Haugen's alleged gesture of reaching for a weapon, unlike *Reese* and *Thompson*, and no report of a weapon or shots fired, also unlike *Thompson*. In addition, Brosseau shot Haugen at a

time when she admitted that she was under no apprehension that Haugen was threatening her with a weapon or, indeed, that he was doing anything other than starting to drive. Equally important, as noted above, the facts are disputed as to whether Haugen ever dived forward at all—the gesture that allegedly triggered Brosseau's concern. As the court of appeals found, taking the facts in the light most favorable to Haugen, he did not dive forward. *See* 351 F.3d at 383.

The Ninth Circuit's decision is thus consistent with *Wilson v. City of Des Moines*, 293 F.3d 447 (8th Cir. 2002). There, officers shot and killed a suspect because he did not show them his hands and they allegedly feared a weapon. The Eighth Circuit, which decided *Thompson* only the year before, denied the officers summary judgment because of factual disputes about the suspect's stance and what he was actually doing with his hands. *Id.* at 451-54; *accord Ribbey v. Cox*, 222 F.3d 1040, 1043 (8th Cir. 2000) (denying summary judgment to officer who fatally shot passenger of car after a high-speed chase because passenger allegedly reached to the floor, where there was a factual dispute regarding whether officer had cause to believe that the passenger, who turned reflexively away from the breaking window, was reaching for a weapon); *Carter v. City of Chattanooga*, 803 F.2d 217, 225-27 (6th Cir. 1986) (unreasonable for officer to shoot suspect when he was holding something officer thought might be a gun, but which was actually a wash cloth).

This variation in outcomes—even within circuits—among cases involving the deadly use of force to prevent a suspect from escaping in a vehicle or where a suspect is supposedly reaching for an object, is the natural outgrowth of the different circumstances at hand, not proof that the *Garner* test is unclear or that there is a circuit split that calls for resolution by this Court. Review of the cases shows that their different outcomes reflect different facts, not disagreements on the law. Whether the Ninth Circuit correctly applied the test to one of those sets

of "limitless factual circumstances," *Saucier*, 533 U.S. at 205, presents no issue worthy of this Court's review.

II. THE NINTH CIRCUIT'S DECISION FAITHFULLY APPLIED THIS COURT'S QUALIFIED IMMUNITY PRECEDENTS AND CREATES NO SPLIT IN THE CIRCUITS ON WHETHER THE LAW WAS CLEARLY ESTABLISHED THAT THE SHOOTING WAS UNLAWFUL.

Turning to the second step of *Saucier*'s two-step qualified immunity analysis, 533 U.S. at 200-202, the Ninth Circuit analyzed whether Haugen's Fourth Amendment right was "clearly established" such that it was "defined with sufficient specificity that a reasonable officer would have known she was violating it." 351 F.3d at 391. The court of appeals correctly held that it was.

Brosseau argues that the court's holding that the constitutional violation was clearly established is "[t]he most blatantly-incorrect aspect of the Ninth Circuit's opinion," Cert. Pet. 21, without articulating what legal error it believes the court committed. Her argument is based on little more than the fact that there was a dissent from the court of appeals panel's opinion and a dissent from the denial of rehearing en banc. She argues that "[r]easonable mistakes are entitled to immunity," and that "[i]f 'officers of reasonable competence could disagree on th[e] issue, immunity should be recognized.'" Cert. Pet. 21 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). Here, Brosseau continues, "Ninth Circuit *judges* could not agree that Brosseau's acts were a violation." *Id.*

This Court has addressed just such an argument in the context of interpreting the meaning of "clearly established [federal] law" for purposes of the standard of review set forth in the federal habeas corpus statute, 28 U.S.C. § 2254(d)(1). In *Williams v. Taylor*, 529 U.S. 362 (2000), the Court considered the Fourth Circuit's approach to determining whether a state

court ruling "involved an unreasonable application of [] clearly established Federal law, as determined by the Supreme Court of the United States." The court of appeals had held that a state-court decision involved such an unreasonable application "only if the state court has applied federal law 'in a manner that reasonable jurists would all agree is unreasonable.'" *Id.* at 409 (O'Connor, J.) (citation omitted). Rejecting this additional overlay, this Court reasoned that "[d]efining an 'unreasonable application' by reference to a 'reasonable jurist,' however, is of little assistance to the courts . . . and, in fact, may be misleading." Instead, the habeas court should ask whether the state court's application of clearly established federal law was "objectively unreasonable" and "should not transform the inquiry into a subject one by resting its determination instead on the simple fact that at least one of the Nation's jurists has applied the relevant federal law in the same manner the state court did." *Id.* at 409-10. As the Court emphasized in that analogous context, "the standard for determining when a case establishes a new rule is 'objective,' and the mere existence of conflicting authority does not necessarily mean a rule is new." *Id.* at 410; *cf. Beard v. Banks*, --- S. Ct. ---, slip op. at 9 n.5 (June 24, 2004) ("Because the focus of the inquiry [for purposes of habeas corpus retroactivity analysis] is whether *reasonable* jurists could differ as to whether precedent compels the sought-for rule, we do not suggest that the mere existence of a dissent suffices to show that the rule is new."). That there was a dissent in the court of appeals has no bearing on either whether Brosseau's decision to shoot Haugen was objectively unreasonable or whether Haugen's right not to be shot under the circumstances was clearly established.

Haugen does not quarrel with Brosseau's statement that police officers are entitled to "fair warning" that their actions violate an individual's rights. Cert. Pet. 22 (citing *Hope v. Pelzer*, 536 U.S. 730 (2002)). Here, the constitutional test governing the use of deadly force was clearly set out in *Garner*

in 1985 and further addressed in *Graham* in 1989, long before Brosseau shot Haugen. Nor does it matter whether any case law addressed the factual idiosyncracies of the situation confronting Brosseau when she fired—although there was such similar case law. *See* Part I.B., *supra*. *Hope* teaches "that officials can still be on notice that their conduct violates established law even in novel factual circumstances" and that there is no need for previous cases to be "fundamentally similar." 536 U.S. at 741. As this Court explained in *United States v. Lanier*, 520 U.S. 259, 271 (1997): "[A] general constitutional rule already identified in the decision law may apply with obvious clarity to the specific conduct in question . . . ." Under *Garner*, it should have been plain to a reasonable officer in Brosseau's position that Haugen posed no threat of death or serious physical harm to her or anyone else.

Brosseau maintains that other circuits addressing "the same legal issue on similar facts have uniformly applied the [qualified immunity] doctrine to the officer's conduct." Cert. Pet. 22. Again, that contention is baseless. In analogous cases, the court of appeals have denied summary judgment to officers seeking qualified immunity. *See* Part I.B., *supra*.

III. THIS CASE TURNS ON ITS OWN FACTS AND DOES NOT SIGNAL THAT DEADLY FORCE CASES WILL ROUTINELY GO TO TRIAL IN THE NINTH CIRCUIT.

Finally, Brosseau argues that the Ninth Circuit's decision will mean that all § 1983 cases involving the use of deadly force will routinely be sent to trial in that Circuit, defeating the purposes of qualified immunity. Cert. Pet. 4, 13, 24. Her assertion has already been disproved. In several cases handed down in the 11 months since the panel's decision was first announced in August 2003, the Ninth Circuit has already upheld the grant of summary judgment in favor of officers employing deadly force, including in instances in which the

suspect attempted to escape by vehicle. *See, e.g., Dehertoghe v. City of Hemet,* 2003 WL 22854682 (9th Cir. Dec. 2, 2003) (holding use of deadly force not unreasonable); *Smith v. City of San Bernardino,* 2003 WL 22682491 (9th Cir. Nov. 12, 2003) (upholding use of deadly force following high-speed chase); *Mason v. Horan,* 2003 WL 22000316 (9th Cir. Aug. 22, 2003) (upholding finding of qualified immunity in favor of federal agent who shot suspect after he attempted to ram agent with his truck), *cert. denied,* 124 S. Ct. 1724 (2004); *cf. Torres v. Runyon,* 2003 WL 22598339 (9th Cir. Nov. 6, 2003) (holding prison guard entitled to qualified immunity for use of deadly force under the Eighth Amendment to stop a prison riot), *cert. denied,* 124 S. Ct. 2418 (2004). That the same court continues to hand down decisions finding no Fourth Amendment violation or granting qualified immunity only serves to confirm again the fact-bound nature of these kinds of cases.

Brosseau and her amici conjure up images of Brosseau acting in the heat of the moment to stop a "desperate and combative felon," Cert. Pet. 2, who was "visibly disturbed," States Amici Br. 14 (quoting 351 F.3d at 395 (Gould, J., dissenting)), and in "unstable frame of mind." Peace Officers Amicus Br. 4. These inflammatory characterizations of Haugen and his actions find no support in the record—unless, of course, any suspect who seeks to avoid arrest is necessarily deranged because the officer could shoot to kill. Officer Brosseau shot an unarmed man in the back as he attempted to drive away from her. In these circumstances, the officer's actions *should* be second-guessed. *See Harlow v. Fitzgerald,* 457 U.S. 800, 819 (1982) ("Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate . . . .").

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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